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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, as the Representative of the Estate of Charles Evans, et al., Plaintiffs, vs. ARIZONA CARDINALS FOOTBALL CLUB, LLC, et al., Defendants.	Case No. 3:16-cv-01030-WHA PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CERTIFICATION AND ENTRY OF JUDGMENT UNDER FED. R. CIV. P. 54(b) AND FOR A STAY OF PROCEEDINGS Date: June 15, 2017 Time: 8:00 a.m. Courtroom: 8, 19th Floor Honorable William Alsup

Plaintiffs submit this reply in support of their motion for certification and entry of judgment under Fed. R. Civ. P. 54 (b) and request for stay.

I. RULE 54(b) CERTIFICATION IS PROPER.

The Court's Order Granting the Clubs' Motion to Dismiss (Dkt. No. 224) ("May 15 Order") dismissed the concealment claims of all 12 named plaintiffs against the 32 Club defendants. It also dismissed the intentional misrepresentation claims of all plaintiffs but for two, Messrs. Carreker and Walker. The only claims that remain intact are Mr. Carreker's intentional misrepresentation claims against the Broncos and Packers and Mr. Walker's against the Chargers. These remaining claims are narrow, involving only Mr. Carreker's 2013 heart incident and Mr. Walker's 2014 ankle sprain. Almost nothing remains of the case. Rule 54(b) certification and a stay of those two remaining claims (against three teams) is entirely proper.

Certification poses no danger of "piecemeal" appeals within the proper scope of the single-appeal principle. The vast majority of the claims have been finally adjudicated. No dispute exists concerning either the "finality" or "judgment" elements of Rule 54(b) certification of those claims. No "just reason for delay" exists to delay the appeal of the numerous dismissed claims of ten plaintiffs pending resolution of only two discrete claims, based on two injuries, by two plaintiffs, against three teams. *See generally Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 902-03 (2015) (Dkt. No. 232 at 1) ("Rule 54(b) was adopted in view of the breadth of the 'civil action' the Rules allow, specifically 'to avoid the possible injustice' of 'delay[ing] judgment o[n] a distinctly separate claim [pending] adjudication of the entire case….' The Rule thus aimed to augment, not diminish, appeal opportunity." (quoting Report of Advisory Committee on Proposed Amendments to Rules of Civil Procedure 70 (1946)).

Jewel v. NSA, 810 F. 3d 622 (9th Cir. 2015), cited by the Clubs at pages 3 – 4 of their brief, is inapposite. There the "sliver of the case" certified under Rule 54(b) was but one claim of seventeen in the complaint. *Id.* at 629. Here, the only "sliver" is the two remaining claims and the claims for which Rule 54(b) certification is requested comprise almost the entire case. And unlike here, the single claim carved out for certification did not even "present final adjudication of a complete claim on the facts, the theories for relief, or the parties."

The Clubs argue that the remaining claims are not sufficiently separate from the claims for which Plaintiffs seek Rule 54(b) certification. Dkt. No. 232 at 1, 4. This Court has said otherwise, that this case was *not yet* a class action, but a putative class action, comprised of the discrete claims of the twelve named individual plaintiffs. (*e.g.* Dkt. No. 224 at 2:26-2:28) The Court required Plaintiffs to plead plaintiff-specific, individualized facts against each of the named defendants, underscoring the separateness of the plaintiffs' claims for Rule 54(b) purposes. *Id.* at 3:2-3:5.

Had Plaintiffs moved for class certification, the Clubs would have vigorously argued that the claims of the individual named plaintiffs – and absent class members – were too individualized, too distinct, too dependent upon individualized proofs – too separate and distinct, one from the other – to permit class certification under Fed. R. Civ. P. 23. The Clubs' brief confirms that position. *See, e.g.,* Dkt. No. 232 at 4 ("[w]hile many of the individual claims in this case are distinct from one another…."); *id.* at 8, n. 7 ("the most that plaintiffs could have sought to certify would have been separate classes consisting of former players employed by each club").[1]

Besides, contrary to the Clubs' argument, "[t]he Rule 54(b) claims do not have to be separate from and independent of the remaining claims." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991) (recognizing "[t]he present trend is toward greater deference to a district court's decision to certify under Rule 54(b)" and citing *Continental Airlines v. Goodyear Tire & Rubber Co.*, 819 F. 2d 1519 (9th Cir. 1987), as upholding "Rule 54(b) certification even though the remaining claims would require proof of the same facts involved in the dismissed claims"). Just as in *Ahmadi v. Chertoff*, 2008 WL 1886001, at * 6 (N.D. Cal. Apr. 25, 2008), "[a]ppeal of the dismissed claims will not involve factual questions at issue in plaintiffs' individual claims…but rather whether this Court erred as a matter of law by dismissing the claims. Thus,

[1] *See also* Motion to Dismiss [Dkt. 139] at 14:4-6 (class allegations should be dismissed because RICO claim should be dismissed and that claim was the only one asserted on behalf of putative class); Motion to Dismiss [Dkt. 212] at 4:9 – 5:1-13 (new allegations of putative class are unconnected to allegations of thirteen named plaintiffs); Reply in Support of Motion to Dismiss [Dkt. 158] (because only RICO claim was asserted for class, dismissal of RICO claim compels denial of class certification).

the dismissed claims are sufficiently separate and distinct from plaintiffs' individual claims…the only remaining claim in this action."

The Clubs' argument that the statute of limitations issue for appeal is unrelated to the two surviving claims (Dkt. No. at 6 – 7) underscores the separateness of the remaining and surviving claims for Rule 54(b) purposes.

II. A STAY IS APPROPRIATE.

The Court has broad discretion to enter a stay under its "inherent power to control the disposition of causes on its docket in a manner which will promote economy of effort and time for itself, for counsel, and for the litigants." *CMAX, Inc. v. Hall*, 300 F. 2d 265, 268 (9th Cir. 1962). A stay would prosper efficiency by removing the prospect of duplicate trials for Messrs. Carreker and Walker if their dismissed claims are reinstated on appeal. Nor does a stay create any undue prejudice for the Clubs, which have already deposed Messrs. Carreker and Walker, gotten their written discovery answers, and obtained their medical records and other documents. A delay pending the appeal of the great bulk of the claims creates no fairness.

The Clubs' argument about the supposed $8 MM at stake in the remaining claims is seriously overstated. After the May 15 Order, the Clubs requested that the remaining Plaintiffs revise their initial disclosures as to damages because, in the Clubs' opinion, it limited the injuries at issue to Mr. Carreker's 2013 heart incident and Mr. Walker's 2014 ankle sprain. On June 2, two days after Plaintiffs filed the instant motion, the parties met and conferred about that issue and agreed that they would exchange supplemental initial disclosures on June 9 addressing, in part, the damages issue. On June 9, Messrs. Carreker and Walker provided those disclosures in which they agreed with the Clubs that the May 15 Order dismissed all their claims save for those intentional misrepresentation claims predicated on Mr. Carreker's 2013 heart incident and Mr. Walker's 2014 ankle sprain.

In other words, at the time Plaintiffs filed the instant motion, their view of the May 15 Order was that, while Mr. Carreker and Mr. Walker's concealment claims had been dismissed, their intentional misrepresentation claims had not. But after discussing the issue with the Clubs and further reflection, Messrs. Carreker and Walker now agree that only a portion of their

intentional misrepresentation claims remain. That is – while their intentional misrepresentation claims as predicated on the 2013 heart incident (Carreker) and 2014 ankle sprain (Walker) remain, to the extent both Plaintiffs predicated those claims on other injuries (and they did), such claims have been dismissed. That point, in Plaintiffs' view, further militates in favor of granting the instant motion so as to avoid the very real possibility of having two trials for Mr. Carreker and Mr. Walker on the same claim but for different injuries. *See, e.g., Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir. 1987); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 70 (2d Cir. 1977); *Chamberlain v. Harnischfeger Corp.*, 516 F. Supp. 428, 430 (E.D. Pa. 1981).

III. CONCLUSION.

The Plaintiffs respectfully request that the Court certify all the dismissed claims for appeal under Rule 54(b) and stay the two remaining claims during that appeal.

DATED: June 12, 2017

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